

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

WILLIAM HOWARD FOWLER

PLAINTIFF

vs.

No. 1:93cv316-D-D

LEGGETT & PLATT, INC.,
d/b/a LEGGETT & PLATT
- TUPELO FIBERS DIVISION

DEFENDANT

MEMORANDUM OPINION

This matter is before the undersigned on the motion of the plaintiff William Howard Fowler to remand this cause to the County Court of Lee County, Mississippi. Finding the motion well taken, this court acknowledges that it has no subject matter jurisdiction over the matter at bar. Therefore, the plaintiff's motion to remand this cause to the County Court of Lee County, Mississippi is granted.

DISCUSSION

This wrongful discharge action was originally filed in the County Court of Lee County, Mississippi on September 9, 1993. In his amended complaint filed in the County court on September 23, 1993, the plaintiff prayed for "actual and punitive damages in an amount to be determined by a jury, but less than \$50,000.00 and for reasonable attorney's fees."¹ Defendant Leggett & Platt removed

¹ The jurisdiction of a county court in Mississippi is "jurisdiction concurrent with the circuit and chancery courts in all matters of law and equity wherein the amount of the thing in controversy shall not exceed, exclusive of costs and interests the sum of fifty thousand dollars (\$50,000.00) . . ." Miss. Code

this action to this court on October 25, 1993. Plaintiff filed the motion to remand presently before this court on June 13, 1994.

Defendant first opposes this motion by noting that the plaintiff filed it more than seven months after the notice of removal. A motion to remand based upon defects in the removal procedure must be made within thirty days after the filing of the notice of removal. 28 U.S.C. § 1447(c). However, this court is required to remand any action over which it has no subject matter jurisdiction at any time before final judgment. Buchner v. F.D.I.C., 981 F.2d 816, 819 (5th Cir. 1993); 28 U.S.C. § 1447. An objection to the subject matter jurisdiction of this court may be raised by any party at any time in the course of these proceedings, and may even be raised by the court sua sponte. See Mall v. Atlantic Financial Federal, 127 F.R.D. 107 (W.D. Pa. 1989); Glaziers, Glass Workers of Jacksonville v. Florida Glass and Mirror of Jacksonville, 409 F.Supp. 225, 226 (M.D. Fla. 1976); 28 U.S.C. § 1447. This court must now address its jurisdiction over this action.

No federal question jurisdiction has been asserted by the parties. The matter in dispute is whether this case satisfies the requirements of federal law to allow for the application of diversity jurisdiction pursuant to 28 U.S.C. § 1332. The arguments of counsel center not around the diversity of the

Ann. § 9-9-21 (1972).

parties, but rather the jurisdictional amount involved. In order to invoke diversity jurisdiction, one requirement is that the amount in controversy be in excess of \$50,000.00.

The determination that must be made is whether this court would have had original jurisdiction to hear this action if the case had been filed here instead of state court. Grubbs v. General Electric Credit Corp., 405 U.S. 699, 702, 92 S.Ct. 1344, 1347, 31 L.Ed.2d 612 (1972); 28 U.S.C. § 1332. To determine whether this jurisdiction existed, "the general federal rule has long been to decide what the amount in controversy is from the complaint itself, unless it appears or is in some way shown that the amount stated in the complaint is not claimed 'in good faith.'" Horton v. Liberty Mutual Insurance Company, 367 U.S. 348, 353, 81 S.Ct. 1570, 1573, 6 L.Ed.2d 890 (1961).

Since in the present case plaintiff argues that he has plead an amount **below** the jurisdictional amount, it is the defendant, as the party asserting federal jurisdiction, who bears the burden of showing that the plaintiff acted in bad faith in asserting his claim. Asociacion Nacional De Pescadores v. Dow Quimica, 988 F.2d 559, 563 (5th Cir. 1993). Defendant contends that this court need not remand this cause unless it appears to a legal certainty that the plaintiff would recover less than \$50,000.00 from the defendant in this action. St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 289, 58 S.Ct. 586, 590, 82 L.Ed. 845 (1938). However,

this standard was applied in St. Paul to a plaintiff who opposed remand and asserted federal jurisdiction, and thus bore the burden of proof. In this case, the defendant has the burden of proof. The specifics of the extent of the burden borne by the defendant in this case are uncertain in the Fifth Circuit², but in the case at hand, this uncertainty does not prevent a finding by the court in this matter. Regardless of the degree to which the defendant must prove the matter, it must prove that the amount of the plaintiff's claim is in excess of the threshold jurisdictional amount. Furthermore, a plaintiff such as Mr. Fowler may avoid federal diversity jurisdiction merely by pleading damages below the jurisdictional amount, and waiving his claim to any greater amount. St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. at 289, 58 S.Ct. at 590; See 14A C. Wright & A. Miller, Federal Practice and Procedure § 3275, p.418-419 (2d ed. 1985). The Mississippi Rules

² The Fifth Circuit did resolve this issue at one point, choosing to place a heavy burden upon the defendant. Kliebert v. Upjohn Co., 915 F.2d 142, 146 (5th Cir. 1990) ("To establish plaintiff's bad faith and sustain federal court jurisdiction in this case we hold, therefore, that the defendants [are] required to establish that the plaintiff would, if successful, recover at least the minimum jurisdictional amount.") In contrast, Judge Jolly opined in his dissent that a better standard would be one where the defendant need only show that the plaintiff's claim was **probably** in excess of the jurisdictional amount. Kliebert, 915 F.2d at 147. However, this decision does not bind this court as precedential authority, in that the decision was later vacated by the Fifth Circuit. Kliebert v. Upjohn Co., 923 F.2d 47, 47 (5th Cir. 1991). The case was later settled by the parties, and the court never readdressed the issue. Kliebert v. Upjohn Co., 947 F.2d 736, 737 (5th Cir. 1991).

of Civil Procedure prohibit a party from recovering any amount beyond that which has been plead. Miss. R. Civ. P. 54(c). A federal court cannot exercise jurisdiction in such a case, because it is legally certain that the plaintiff cannot recover more than the amount that he has plead.³

In the instant case, Mr. Fowler plead for "actual and punitive damages in an amount to be determined by a jury, but less than \$50,000.00 . . ." By pleading in such a manner, he has expressly waived any recovery for actual or punitive damages in excess of the jurisdictional amount required to establish diversity jurisdiction in this court. Therefore, it is legally certain that he cannot recover sufficient actual or punitive damages to meet the necessary jurisdictional amount. However, defendant properly points out that the claim for attorney's fees is not limited by the "less than" language of the complaint. Because of this, the defendant argues, the amount of the plaintiff's recovery would "easily exceed the \$50,000.00 limit."

It is true that a claim for attorney's fees may be included in the calculation of the jurisdictional amount. Foret v. Southern Farm Bureau Life Ins. Co., 918 F.2d 534, 537 (5th Cir. 1990);

³ It is true that under Mississippi law, a party may amend his complaint to conform to the judgment rendered by the court. However, this court is of the opinion that the type of waiver undertaken by the plaintiff to avoid diversity jurisdiction would also constitute a waiver of any amendments to his complaint to increase recovery over the jurisdictional amount.

Graham v. Henegar, 640 F.2d 732, 735 (5th Cir. 1981). The next determination that would normally need to be made is whether the claim for attorney's fees is a valid one under Mississippi law. See Foret, 918 F.2d at 537. However, in this case, the court need not go quite that far. The defendant asserts that the total recovery to which the plaintiff would be entitled should he recover exceeds \$50,000.00. However, the defendant provides no facts in support of this contention. All that is before the court on this point is the defendant's speculation and conjecture. The plaintiff on the other hand has submitted to this court an affidavit explaining the nature of his claim, and this court may properly consider it. Asociacion, 988 F.2d at 565 (noting that plaintiff cannot change damage request to defeat removal but may be permitted to clarify it). The defendant has not challenged this affidavit, and has offered insufficient facts to establish that the plaintiff would absolutely, or even probably, recover an amount beyond the base jurisdictional requirement for this court to exercise diversity jurisdiction. Because the defendant has failed to meet its burden of proof in this matter, the plaintiff's motion to remand will be granted.

A separate order in accordance with this opinion shall issue this day.

THIS _____ day of October, 1994.

United States District Judge

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LEGGETT & PLATT, INC.,
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DEFENDANT

ORDER GRANTING PLAINTIFF'S MOTION TO REMAND

Pursuant to a memorandum opinion issued this day, it is hereby
ORDERED THAT:

1) Plaintiff's motion to remand this matter to the County
Court of Lee County, Mississippi is hereby GRANTED, in that this
court has no subject matter jurisdiction over this cause.

All memoranda, depositions, affidavits and other matters
considered by this court in granting the plaintiff's motion to
remand are hereby incorporated and made a part of the record in
this cause.

SO ORDERED, this ____ day of October, 1994.

United States District Judge